

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 154494

Plaintiff-Appellant

Court of Appeals No. 325883

v

Mackinac Circuit Court
No. 2012-003474-FH

GARY MICHAEL TRAVER,

Defendant-Appellee.

**SUPPLEMENTAL BRIEF ON APPEAL OF
THE PEOPLE OF THE STATE OF MICHIGAN**

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS PRESENTED

In its February 3, 2017 order granting argument on the prosecution's application for leave, the Court identified five questions that it asked the parties to brief:

1. Whether the trial court erred by providing written instructions to the jury on the elements of the charged offenses but not reading those instructions aloud to the jury.

Appellant's answer: No.

Appellee's answer: Yes.

Trial court's answer: Did not answer.

Court of Appeals' answer: Yes.

2. Whether the trial court's instructions on the charge of possession of a firearm during the commission of a felony, MCL 750.227b, fairly presented the issues to be tried and adequately protected the defendant's rights.

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: Did not answer.

Court of Appeals' answer: No.

3. Whether the defendant waived any instructional errors when his attorney expressed satisfaction with the instructions as given, see *People v Kowalski*, 489 Mich 488 (2011).

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: Did not answer.

Court of Appeals' answer: No.

4. What standard of review this Court should employ in reviewing the Court of Appeals decision to order an evidentiary hearing on the ineffective assistance of counsel claim.

5. Whether the Court of Appeals erred under the applicable standard when it ordered an evidentiary hearing for defendant to establish the factual predicate for his claim that his trial counsel was ineffective for failing to properly advise him of the potential consequences of withdrawing his guilty plea. See MCR 7.211(C)(1)(a)(ii) and *People v Ginther*, 390 Mich 436, 445 (1973).

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: Did not answer.

Court of Appeals' answer: Did not answer.

INTRODUCTION

In granting argument on the People's application for leave, this Court has directed the parties to address five different questions, which include both novel questions of Michigan law and the application of well-established principles. The Court of Appeals here failed to follow this Court's decisions on established principles, creating a conflict in the law between this Court's holding and the lower court's published decision. This Court should reverse. In arguing for reversal, the People provide the following five answers to the Court's questions:

First, with regard to the written instructions, nothing in Michigan law expressly requires that the instructions be given orally, as opposed to in writing. The word "instruct," as used in the court rules and statute, does not inherently mean oral. While the law might contemplate that the instructions be read by the court, nothing requires it, and this Court has held that even ex parte written substantive communication to a deliberating jury is subject to a harmless-error analysis. The same would apply here.

Second, as argued in the People's application, the instructions, even as understood by the Court of Appeals' majority, fairly presented the issues for the jury to resolve on whether Gary Traver possessed a firearm during the commission of a felony (felony-firearm). The framing of the issue by the parties in closing argument confirms this point. The jury fully understood that it had an obligation to find that Traver possessed the firearm and that he possessed the firearm while committing a felony to find him guilty. There was no error here.

Third, Traver waived this issue on appeal, under *People v Kowalski*, 489 Mich 488 (2011), by expressly agreeing to the instructions as given. This is the central mistake of the Court of Appeals' decision. The rule is long-established in Michigan, is well supported in practice, and is the prevailing one in other courts, including the federal courts. Indeed, even an error that would otherwise be structural is subject to waiver. This Court has recognized as much, such as with the closure of the courtroom. Thus, because any error was extinguished by his waiver, Traver was left only with the claim that his counsel was ineffective for agreeing to the instructions. But he cannot demonstrate a reasonable probability of a different outcome. That is true both with regard to any obligation to read the instructions orally and to the specific felony-firearm instruction.

Fourth, the Court of Appeals should order an evidentiary hearing under *People v Ginther*, 390 Mich 426 (1973), only where the criminal defendant files a timely motion for remand with an affidavit or other documentary evidence supplied under MCR 7.211(C)(1)(a)(ii) to the Court that, if credited, might require relief. While the Michigan court rules allow for the Court of Appeals to remand for a hearing to allow additional evidence "at any time," MCR 7.216(A), this rule should be reserved for exceptional circumstances, because otherwise it would swallow the specific rule for remands and the time limitations established in MCR 7.211(C).

Fifth, in applying that standard here, Traver was not entitled to a hearing as he did not file a motion to remand and as his arguments on appeal did not support relief. The Court should have denied his claim.

In short, on the key issue of the case, this Court should confirm that *Kowalski* is binding, so any claim with regard to the jury instructions was waived, and Traver cannot show that he is entitled to relief because he was not prejudiced.

STATEMENT OF FACTS AND PROCEEDINGS

The People will rely on the facts and proceedings as outlined in their application, but shall include any necessary additional facts in the body of the brief.

STANDARD OF REVIEW

“The same legal principles that govern the construction and application of statutes apply to court rules.” *People v Williams*, 483 Mich 226, 232 (2009). “When construing a court rule, we begin with its plain language; when that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation.” *Id.*

ARGUMENT

I. Michigan law does not expressly require that the jury instructions be orally provided, and any possible error related to this obligation would be subject to harmless-error review.

The ordinary practice in Michigan is for the trial court to read the jury the instructions on the law. While this ordinary practice is not specifically required by the court rules, the process the rules describe appears to contemplate a reading of the instructions, by directing the court to invite the jury to ask questions about the instructions before beginning to deliberate. But Michigan law is clear that if there is such an obligation, it is subject to harmless-error review.

A. While the law might anticipate an oral recitation of the instructions, it does not specifically require this approach and due process does not require an oral recitation.

As noted by Judge Sawyer in his dissent, the court rules do not “specifically require that the jury be verbally instructed in writing” of the instructions to follow. Slip op, p 4. The primary structure for the provision of jury instructions appears in the court rules, MCR 2.512 and 2.513. These rules indicate that the court shall “instruct” the jury, but do not specify it must be “orally.”

The general structure for instructions on jury’s deliberations begins with 2.512(B)(2), where the court may instruct the jury before or after closing arguments:

Before or after arguments or at both times, as the court elects, the court shall *instruct* the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party’s theory of the case. [MCR 2.512(B)(2) (emphasis added).]

Consistent with this rule, MCR 2.513 then describes in some detail the process for providing a jury its final instructions:

After closing arguments are made or waived, the court must *instruct* the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may *instruct* the jury before the parties make closing arguments. After jury deliberations begin, the court may *give additional instructions* that are appropriate. [MCR 2.513(N)(1) (emphasis added).]

In each reference, the word used is “instruct” or “instruction.” The Court of Appeals relied on a dictionary definition, stating that the word “instruct” means “to give knowledge to: teach, train,” “to provide with authoritative information or advice,” or “to give someone an order” from *Merriam-Webster’s Collegiate Dictionary* (11th ed), p 649. Slip op, pp 5–6. This is a good definition. But the majority below then asserted that “[t]eaching almost always begins as a verbal experience” and

that “historically, judges have taught jurors the law by speaking to them.” Slip op, p 6. As Judge Sawyer noted, this additional gloss is not required by the court rule text. Slip op, p 5 (“while teaching often is verbal, that does not mean that it must be verbal”). Indeed, while MCR 2.512 and 2.513 use the word “written” repeatedly, they use it in conjunction with instructions only once: in requiring that a written copy of the instructions go with the jury into the jury room, MCR 2.513(N)(3)

This fact that the rules require the trial court to provide a “written copy” of the final instructions for the jury’s use in the jury room, MCR 2.513(N)(3), does not mean that the court has to read the instructions aloud. Contra slip op, p 5. As noted in the People’s application (at 15), this rule would still apply if the court had provided written instructions before the jury retired to the jury room to deliberate.

Even so, the rules further explain that the trial court should “invite” the jury to ask any questions” with regard to the instructions before beginning to deliberate:

Upon concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate. [MCR 2.513(N)(2).]

Context reveals that the jury’s questions may be oral ones, because earlier in this same subsection, the jury is invited to provide “written questions” under seal. MCR 2.513(N)(2) (“As part of the final jury instructions, the court shall advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations.”). The fact that this reference only states “questions” as opposed to “written questions” supports the conclusion that the jury could orally ask questions of the trial court.

Thus, it appears that the instructions anticipate that the trial court will read the jury instructions orally to the jurors and then ask if they have any questions.

See MCR 2.513(N). The court rules match the statute governing instructions:

The court shall *instruct* the jury as to the law applicable to the case *and in his charge make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require*. [MCL 768.29 (emphasis added).]

Thus, the statute also uses the verb “instruct,” but authorizes the trial court to give oral direction in referring to “comment[s].” But neither the rules nor statute require that the instructions be given orally, and it was not what occurred here.

In the case, at the time of final instructions, the trial court relied on the jury’s familiarity with the elements when the court provided them a copy of the instructions before opening statements, directing the jury “to take a look” at them. (Trial, Nov 12, 2014, p 34.) The trial court also provided the jury with final instructions after closing arguments. The instructions were almost all given orally. (*Id.* at 187–199.) But the trial court did not read the elements of the crimes. Rather, the trial court referred to the instructions that it had “already given,” again directed the jury that it “must take all of these instructions together as the law,” and explained that the jury “already received the charges and elements” of the four charged offenses. (*Id.* at 188, 192.) At the beginning of the trial, the court had identified the four counts – (1) carrying a concealed weapon (CCW), (2) assault with a dangerous weapon, i.e., felonious assault, (3) interference with a telephone; and (4) possession of a firearm at the time of the felony – and read to the jury from the charging document (the Information). (*Id.* at 9–10.) At that time, the court noted

that it had “given you written copies of the instructions” covering the elements. (*Id.* at 36.) Thus, for the final instructions, the trial court relied on the written version that it had earlier provided to the jury.

Nothing in rule or statute directly prohibits this approach. And nothing in due process found in Michigan law otherwise requires the instructions to be orally given. At the same time, the few federal circuits that have reviewed the question have generally required that instructions be given orally, finding that a trial court errs if it “fail to read aloud jury instructions in their entirety.” *United States v Robinson*, 724 F3d 878, 887–888 (CA 7, 2013), citing *United States v Perry*, 479 F3d 885, 893 (DC, 2007); *Guam v Marquez*, 963 F2d 1311, 1314–15 (CA 9, 1992); *United States v Noble*, 155 F2d 315, 318 (CA 3, 1946). Without clearly identifying the legal basis as either due process or the court’s supervisory authority, the federal court’s analysis is based on the ability to confirm that the jury received the instructions:

For not only are counsel and the defendant entitled to hear the instructions in order that they may, if they are incorrect, object to them and secure their prompt correction by the trial judge, *but it is equally important to make as certain as may be that each member of the jury has actually received the instructions.* It is therefore essential that all instructions to the jury be given by the trial judge orally in the presence of counsel and the defendant. [*Noble*, 155 F3d at 318 (emphasis added).]

In contrast, other courts have taken the position that any error in the oral instructions is cured by the written ones, with the understanding that jurors are presumed, when directed, to read and follow the written instructions. See, e.g., *People v Garceau*, 6 Cal 4th 140, 189–190 (1993) (trial court’s omission of portion of a jury instruction held harmless because jurors received correct instruction in written form), overruled on other grounds, *People v Yeoman*, 31 Cal 4th 93 (2003).

It is hard to square the general federal rule finding error for any written instructions with the old maxim that a court “speaks through its written orders.” See, e.g., *People v Davis*, 225 Mich App 592, 600 (1997), citing *Tiedman v Tiedman*, 400 Mich 571, 576 (1977). All sorts of important legal obligations arise predicated on written documents, whether it is signing a contract or receiving a subpoena.

And, under Michigan law, the qualifications for jurors require that they be able to “communicate” in English. MCL 600.1307a(1)(b). Prospective jurors also have an obligation to fill out a juror questionnaire, which itself is based on the ability of the juror to read and write. MCL 600.1313(1). Perhaps unwise, but the decision to rely partially on written instructions was not error.

B. Any error related to an obligation to read the instructions would be subject to harmless error review in any event.

The overarching rule that governs overturning a criminal conviction for a claim of procedural error appears in statute and requires proof of a “miscarriage of justice”:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to *any matter of pleading or procedure*, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in *a miscarriage of justice*. [MCL 769.26 (emphasis added).]

See also MCL 768.29 (“The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.”).

In the ordinary case, in the absence of waiver, this Court would have to determine whether the claimed error was constitutional or nonconstitutional in nature and whether it was preserved or unpreserved. *People v Schaefer*, 473 Mich 418, 442–443 (2005), citing *People v Carines*, 460 Mich 750 (1999). This would enable the review court to place the standard for reversal within the matrix of standards from this Court’s opinion in *Carines*, 460 Mich at 774, depending on the nature of the claimed error and whether it was preserved. *Id.* The further delineation would separate constitutional error into structural and non-structural error. *Schaefer*, 473 Mich at 443, n 72, citing *People v Cornell*, 466 Mich 335, 363 (2002).

A claim for any violation of the court rules on the requirement to read aloud the instructions would be nonconstitutional in nature and would not be a structural error. As noted, nothing in Michigan’s jurisprudence requires the trial court to read the instructions aloud. And this Court’s case law supports the point that, if there is such a duty, it would not be structural error to fail to do so.

While it has not examined this issue before, the Court has made clear that in the related setting of providing a written instruction to a deliberating jury – *even without conferring with defense counsel about the substance of the instruction* – there is a harmless error component. It rejected that such a stage would be a critical stage. See *People v Hercules-Lopez*, 485 Mich 1118 (2010), reversing and adopting the dissent in the Court of Appeals, 2009 WL 1879760 (2009) (trial court’s action of sending a note to a deliberating jury as a supplemental instruction “did not prejudice defendant under the circumstances”).

The Court also reached the same conclusion for ex parte communications between the trial judge and a deliberating jury when it overturned the automatic reversal rule. See *People v France*, 436 Mich 136, 146–147 (1990) (regarding written note directed to deliberating jury, the communication “did not result in any prejudicial effect”). The decision that any error in failing to read the instructions orally may be harmless is the same rule of the federal courts. See, e.g., *Perry*, 479 F3d at 893 (defendant failed to demonstrate that “the judge’s error ‘affected the outcome’”). Any error here in failing to give the instructions on the elements orally was harmless as the jury was given them in writing and directed to consider them.

C. Any error in failing to read the instructions aloud was waived.

Any claim here was waived in any event. See Issue III.

II. The trial court’s instructions on the charge of possession of a firearm during the course of a felony fairly presented the issues to be tried.

The instructions taken as a whole informed the jury that it may convict Traver for the crime of possession of a firearm during the course of a felony (felony-firearm) only if Traver used the firearm when committing another felony. The instructions, written and oral, contained all the elements of this crime. The analysis of the Court of Appeals’s majority concluding otherwise is unavailing.

A. The instructions made it clear that Traver had to possess the firearm during a crime to be guilty of felony-firearm.

The elements of felony-firearm require proof that (1) the defendant carried or possessed a firearm, and (2) did so during the course of a felony. *Wayne Co Prosecutor v Recorder’s Court Judge*, 406 Mich 374, 397–398 (1979), overruled in part on other grounds by *People v Robideau*, 419 Mich 458 (1984). See also M Crim

JI 11.34. It does not require a separate conviction for the predicate felony. See *People v Lewis*, 415 Mich 443, 455 (1982). Even so, this point does not “alter the requirement that the underlying felony must have been committed” and thus a valid defense to the underlying felony would also be a defense against a conviction for felony-firearm. See *People v Burgess*, 419 Mich 305, 311 (1984). In reviewing the instructions, this Court examines them as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions “adequately protected the defendant’s rights by fairly presenting to the jury the issues to be tried.” *People v Dumas*, 454 Mich 390, 396 (1997).

In this one-day jury trial, the trial court informed the prospective jurors before jury selection that there were four counts charged, including felony-firearm:

And in count four, weapons, felony-firearm, it is alleged that Mr. Traver did carry or have in his possession a firearm, again, to wit, a 40 semi-automatic weapon at the time of this alleged offense[.] [Trial, pp 9–10.]

After selection, the trial court then distributed written instructions, which were not presented on appeal, but the Court of Appeals relied on the following language from a document in the court file for the fourth count:

Count 4 – Felony-firearm-Possession

Possession does not necessarily mean ownership. Possession means that either:

- (1) The person has actual physical control of the thing as I do with the pen that I am holding, or
- (2) The person knows the location of the firearm and has reasonable access to it.

Possession may be sole where one person alone possesses the firearm. [Slip op, p 4.]

This instruction matches the standard jury instruction for the definition of “possession” for the firearm charge, see M Crim J1 11.34b, but the elements for the crime are listed in a separate page of the standard criminal instructions, see M Crim J1 11.34, and were not in this document.¹

Nonetheless, later that day, the trial court clarified this point. In its instructions after closing arguments, the trial court orally provided the jury with closing instructions. While the court did not reiterate the elements of the crimes, it noted that “I’ve already given you some instructions about the law.” (Trial. Nov. 12, 2014, p 188.) At this point, the counsel for Traver objected that the instructions did not make clear that “there has to be an underlying felony before count four – they could find anybody guilty of count four [i.e., felony firearm].” (Trial, pp 196–97.) The following colloquy, which occurred in the presence of the jury, explained that the possession had to occur while Traver committed another felony:

¹ The standard jury instruction of 11.34 provides as follows:

- (1) The defendant is also charged with the separate crime of possessing a firearm at the time [he / she] committed [or attempted to commit] the crime of _____.
- (2) To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
- (3) First, that the defendant committed [or attempted to commit] the crime of _____, which has been defined for you. It is not necessary, however, that the defendant be convicted of that crime.
- (4) Second, that at the time the defendant committed [or attempted to commit] that crime [he / she] knowingly carried or possessed a firearm.

The standard criminal jury instructions may be found at the following website from this Court:

<http://courts.mi.gov/Courts/MichiganSupremeCourt/criminal-jury-instructions/Documents/MCrimJI.pdf>.

[Defense counsel]: Your Honor, I have a – a problem with count four. I don't think it makes it[] clear that there has to be an underlying felony before count four – they could find anybody guilty of count four.

[Prosecutor]: Your Honor, I think's absolutely correct and I know that I attempted to explain that to the jury, but, you know, I think Mr. Hickman's quite accurate that you can't have felony-firearm, if there is not a conviction for a felony.

In response, the court then instructed the jurors that they had to find *both* an underlying felony *and* use of a firearm in the underlying felony:

THE COURT: Correct. The point that [defense counsel] is making, ladies and gentlemen, is referenced in count four, felony-firearm, possession. If, for example, you find the defendant not guilty of the other three counts, you cannot find him guilty of the felony-firearm. Okay? Because no felony has been committed. Mr. –

[Prosecutor]: But, your Honor, I – I do want it clear, and I think [defense counsel] would agree, that if you're found guilty of one or two or three of the other charges, *and you find that it was committed with a firearm, or you were in possession of the firearm, that's when felony-firearm kicks in.*

THE COURT: *Absolutely, correct. Absolutely, correct. If you do find the defendant guilty in count one, two, or three and understand, in your belief, that a weapon was used to commission [sic, commit] those crimes, then count four would be applicable.* Satisfied gentlemen?

[Defense counsel]: *Yes, your Honor.*

[Prosecutor]: I am satisfied. [Trial, pp 197–198 (emphasis added).]

In other words, in the final instruction bolded above, the trial court gave the jurors the two elements of felony-firearm:

If you do

[1] find the defendant guilty in count one, two, or three
and

[2] understand, in your belief, that a weapon was used to
commission [sic, commit] those crimes,

then count four would be applicable. [Trial, p 197 (emphasis added).]

In substance, that is all that was required to convey the elements of the felony-firearm charge – possession of a firearm during the course of a felony. *Wayne Co Prosecutor*, 406 Mich at 397–398. And therefore the instructions were adequate to fairly present the issues to the jury.

The two embedded errors in the instruction were of no moment. In the first, the trial court agreed that there had to be a conviction on the underlying felony for the jury to convict Traver of felony-firearm. As Judge Sawyer noted in his dissent, slip op, p 2 (“[t]his error . . . worked to defendant’s advantage”), this instruction erroneously elevated the prosecution’s burden because a conviction was not necessary. See *Lewis*, 415 Mich at 455. And for the second, the CCW charge would not support a felony-firearm conviction, see MCL 750.227b(1) and *People v Mitchell*, 456 Mich 693, 697–698 (1998), but again this error was harmless as Traver was acquitted of the charge. Judge Sawyer again noted this point in dissent. Slip op, p 2 n 1 (“This error would have prejudiced defendant had the jury found him guilty of CCW. But because it did not, the error was harmless”). There was no prejudice here.

B. The Court of Appeals failed to properly analyze the issue.

In concluding otherwise, the majority opinion of the Court of Appeals stated that “[t]he jury was not instructed as to either of the two elements of this offense.” Slip op, p 8. But that was not the case. And this was one of the critical errors of the majority’s analysis here.

It is true that this Court has held that the “complete failure” of the trial court to provide “any of the elements necessary to determine” if the defendant is guilty is a structural error for which the defendant is entitled to automatic reversal. *People v Duncan*, 462 Mich 47, 48 (2000). But the contrast between the facts of *Duncan* however, and this case illustrates why the instructions here were adequate.

In *Duncan*, the trial court merely read the information, but then “omitted any instruction regarding the elements of felony-firearm.” 462 Mich at 49. In contrast, here, the trial court provided the jury with a written instruction on the definition of “possession” and later engaged in a five-paragraph discussion on the requirements for finding a person guilty of felony-firearm. And the trial court had previously instructed the jury that it could convict Traver only if the jury found Traver guilty of all the elements beyond a reasonable doubt. (Trial, pp 188–189.) For the element of possession in felony-firearm, the trial court stated that the jury has to “belie[ve]” that “a weapon was used to commi[t] those crimes” (*id.* at 199) and the jury had the written instruction on the meaning of possession. While the trial court did not reiterate the fact that this belief had to be beyond a reasonable doubt, this point in context was clear. For the element of occurring during a felony, the trial court expressly required that the jury find Traver guilty of one of the other felonies. (Trial, p 197.) Unlike *Duncan*, where the jurors were left to guess at the elements because none were provided, the jury here was adequately instructed.

Given the cogency of the dissent’s analysis on this point, it worth quoting Judge Sawyer here:

Defendant has failed to establish the factual predicate of his argument [that the jury had no choice but to find him guilty of the offense once it found him guilty of felonious assault]. The court only stated that felony-firearm would be “applicable” in the identified circumstances, not that the jury must find defendant guilty. *In other words, what the court told the jury was that consideration of the felony-firearm charge was appropriate or relevant if and only if it found defendant guilty of one or more of the other charged crimes and that a weapon was used in the commission of the crime(s).* [Slip op, p 2 (emphasis added).]

This reasoning is spot on.

As a final point, the closing arguments themselves only supported the conclusion that the prosecution had the burden to prove that Traver possessed the gun during the felonious assault or the interference with an electronic communication. The prosecution argued that Traver was guilty of felony-firearm because he possessed the gun in the course of these crimes:

Final charge that we’re looking at today, felony-firearm possession. *Committing any of those first three crimes, while in your possession – or while you have in your possession that firearm. He’s got it with him. He’s got it with him.* Whether he ever intended to use a gun, when he was – in – in his words, he had to check Mr. St. Andre [complainant]. If in his opinion, he was only going to use it to scare someone, using the gun to coerce someone. You knocked the phone out of their hand, you – you waved the gun at ‘em through the window, not through the window, and – and you’re carrying a pistol. And you’re carrying a pistol. All of these charges are absolutely uncontestable. [Trial, p 178 (emphasis added).]

In disputing the charges, Traver’s counsel argued that Traver did not have the gun when he had the confrontation with his neighbor, Patrick St. Andre. Defense counsel repeatedly said that Traver did *not* have a gun and thus was not guilty of the predicate crimes. In a relatively short closing argument, he made this point in at least six times:

Mr. Traver, at that point in time, *didn't have the gun in his hand*. Mr. Traver had only displayed the gun when he was awakened before sunup by somebody outside the window, rummaging around, apparently possibly knocking on the window, saying nasty things to him. . . . And then *he put the gun down* and then he went out to see what was going on. And that's when this confrontation with Mr. St. Andre happened.

* * *

Then he approaches Mr. – *Mr. St. Andre without the gun*, they have a conversation, he th – knocks the phone out of his hand.

* * *

And Mr. Traver all he ever did was try to protect his trailer *and then he left the gun*, went over to the – and they had – they were both coming at each other and Mr. St. Andre holds that phone up and it gets knocked out of his hand.

* * *

But when he went – when – when he went to approach him, *he didn't have the gun*.

* * *

He did not assault anybody with a dangerous weapon. He did not interfere with any telecommunications. *And he was not carrying a weapon in the commission of a felony*. [Trial, pp 181, 182, 184, 185, 187 (emphasis added).]

Consistent with the trial court's instructions that the jury may convict Traver of felony-firearm only if it finds him guilty of one of the predicate felonies and that "a weapon was used to commi[t] those crimes" (Trial, p 197), the prosecution insisted that Traver was armed during the felonious assault, and Traver claimed that he was not armed. The instructions here were adequate and the jury was asked to answer whether Traver possessed a gun during a felonious assault. And it concluded that he did. This Court should affirm his convictions.

III. Where Traver's counsel affirmatively agreed to the instructions, he waived any claim that the jury instructions were erroneous – either because the elements were not given orally or because the elements of felony-firearm were inadequate.

The longstanding rule in Michigan is that an affirmative agreement to the instructions waives any claim to jury error. This is a good rule and applies in general even to structural errors – which is not at issue here. A defendant is left to argue that his counsel was ineffective, an argument that Traver advanced here. This Court should reverse the Court of Appeals on this point, which is the most significant question on appeal.

A. Traver waived any claim to error when his counsel agreed to the jury instructions.

In its decision, the Court of Appeals found two distinct instructional errors, one related to the failure to give the elements of the crimes verbally and the other related to the felony-firearm instructions. See majority opinion, slip op, pp 4–7, 7–8. As argued by this brief above, neither of these claims entitled Traver to relief. In any event, because his counsel waived both of these claims, this Court should reverse the analysis of the Court of Appeals based on waiver as well.

Waiver is an important principle. The point of objections is not to preserve claims of error for appeal, but rather to forestall error in the first place. See *People v Jones*, 468 Mich 345, 381 (1994), citing MRE 103(a). The duty of the criminal defense bar to raise objections ensures that attorneys will attempt to identify possible trial mistakes so that the defendant will not suffer a conviction based on an unfair trial. Everyone is served by this standard.

And the giving of instructions to the jury is a particularly important time for objections given the critical nature of this facet of trial, and the ease by which an error may appear. Cf. MCR 2.512(C) (“A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict . . ., stating specifically the matter to which the party objects and the grounds for the objection.”); see also MCL 768.29. The rules provide that the parties have an opportunity to submit written requests for jury instructions. MCR 2.513(N)(1). And the trial court is bound to inform the parties of its plan regarding the requests before closing argument. Unlike other objections, which sometimes require split-second thinking and an immediate strategic response, the decisions on what the instructions should be allows the parties a more deliberative opportunity. The law rightly encourages defense counsel to object to erroneous instructions.

These principles underscore the wisdom of the well-established proposition of law that where defense counsel affirmatively agrees to an instruction or the instructions generally, that party then cannot be heard to complain about them on appeal. *People v Kowalski*, 489 Mich 488, 503 (2011), citing *People v Carter*, 406 Mich 206, 215 (2000). The agreement extinguishes the error, waiving any ability to raise the claim without arguing ineffective assistance. A criminal defendant cannot harbor error as an appellate parachute. See *People v Buie*, 491 Mich 294, 313 (2012); see also *People v Hardin*, 421 Mich 296, 323 (1984). The agreement to the instruction or instructions forecloses the ability of this Court to review the claim.

Regarding the importance of timely objections, Traver's counsel's objection here serves as a case in point. At the completion of the jury instructions, the trial court had provided a written instruction on felony-firearm addressing only the definition of "possession," but aside from reading the information of the charge, nothing had linked the prosecution's duty to prove the gun possession occurred during the course of the predicate felony. Hence, counsel's objection linked the two when the court asked whether the parties had "[a]ny issue with the instructions":

I have a – a problem with count four [i.e., felony-firearm]. I don't think it makes it[] clear that there has to be an underlying felony before count four – they could find anybody guilty of count four. [Trial, pp 196–197.]

As a consequence of this objection, the trial court both clarified the prosecution's obligation to prove Traver guilty of one of the predicate felonies and also to prove that the possession of the firearm occurred during the course of the felony ("a weapon was used to commi[t] those crimes"). (*Id.* at 197.)

At this point, counsel then expressly approved of the instructions – answering "yes, your Honor" about whether he was satisfied (*id.*) – which served to extinguish any claim with respect to the felony-firearm instructions or to the fact that the trial court had not orally given the jurors the elements of the crimes. This express affirmance was a substantive waiver of these claims. *Kowalski*, 489 Mich at 503 ("When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver"); *Carter*, 462 Mich at 215 ("defense counsel expressed satisfaction with the trial court's decision"). The Court of Appeals was foreclosed from reaching these claims as substantive issues.

B. The Court of Appeals misapplied the law on this issue.

Contrary to *Kowalski*, the majority decision of the Court of Appeals did not address waiver for the claim about giving the instructions orally and for the felony-firearm claim, stating that it need not “resort to ineffective of counsel principles to circumvent potential waiver issues.” Slip op, p 8. This is wrong on both claims.

For the claim about the need to give the instructions orally, the Court of Appeals majority concluded that “[i]t is impossible to determine whether the jurors . . . actually received and considered the instructions addressing the elements.” Slip op, p 7. But the court attached the document on which the jury notes had indicated their verdicts, see slip op, pp 3–4, finding Traver guilty of felonious assault and felony-firearm and not guilty of CCW and telephone interference. Even if error occurred in relying on some written instructions, the majority opinion did not explain why a party could not agree to the instructions in writing, as defense counsel did here, and waive any claim of error. The instruction at issue in *Carter* violated one of the court rules, but defense counsel’s express agreement with the instruction barred this Court’s review. 462 Mich at 215. The same conclusion applies here. Other state courts have ruled the same way. See, e.g., *Rice v State*, 426 NE2d 680, 682 (Ind 1981) (“This right [to have the instructions read aloud], like many other trial rights, both legal and constitutional, are enforced through timely objections and *may be waived*”) (emphasis added). The claim here was waived.

For the claim about the instructions on felony-firearm, the Court of Appeals relied on *Duncan*, concluding that there was a complete failure to provide any of the elements, that the failure was a structural error, and that this Court had created a

“bright line rule” that “required automatic reversal.” Slip op, p 8, quoting *Duncan*, 462 Mich at 48. But in *Duncan* defense counsel did not waive the claim because the defense counsel failed only to “object to the omission,” *id.* at 50, and nothing in this Court’s per curiam opinion addressed the issue of waiver.

As already noted, the claim that the trial court provided no instructions on the elements is a misreading of the record. Thus, the issue resolved by the Court of Appeals is not joined. While imperfect, the jury instructions on felony-firearm were adequate here, and any error was subject to waiver. The claim was waived.

Even if the Court of Appeals were right that the trial court provided no instructions at all on felony-firearm, *Duncan* would not require reversal. The general rule, relied on by *Duncan*, provides for automatic reversal *for preserved claims* on structural errors as they “undermine the fairness of criminal proceeding as a whole.” *United States v Davilla*, 133 S Ct 2139, 2149 (2013). It is the nature of the error that makes the claim unamenable to harmless-error review. *Williams v Pennsylvania*, 136 S Ct 1899, 1909 (2016). The class of cases that involve structural errors is “very limited,” and the U.S. Supreme Court has identified some of them in *Neder v United States*, 527 US 1, 8 (1999):

- complete denial of counsel, *Johnson v United States*, 520 US 461 (1997);
- biased trial judge, *Tumey v Ohio*, 273 U.S. 510 (1927);
- racial discrimination in selection of grand jury, *Vasquez v Hillery*, 474 US 254 (1986);
- denial of self-representation at trial, *McKaskle v Wiggins*, 465 US 168 (1984);
- denial of public trial, *Waller v Georgia*, 467 US 39 (1984);
- defective reasonable-doubt instruction, *Sullivan v Louisiana*, 508 US 275 (1993).

Yet, it is unmistakable that some of these rights – even though structural in nature – may still be waived or forfeited. For example, the U.S. Supreme Court has held that the right to a public trial may be waived by failing to object to the closure of the courtroom. *Peretz v United States*, 501 US 923, 926 (1991). This Court, following the lead of the U.S. Supreme Court, has recognized that a broad array of constitutional rights may be waived. *Carter*, 462 Mich at 217, citing *New York v Hill*, 528 US 110, 114 (2000). This includes some of the “most basic rights of criminal defendants.” *Hill*, 528 US at 114.

If the majority decision below were right that no elements had been given, then the question is whether this error was so significant as to extend beyond the law on waiver. Without specifying the universe of rights, the U.S. Supreme Court has acknowledged that there “may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably discrediting the federal courts.” *United States v Mezzanatto*, 513 US 196, 204 (1995). It listed two cases in support:

Wheat v United States, 486 US 153, 162 (1988) (court may decline a defendant’s waiver of his right to conflict-free counsel); *United States v Josefik*, 753 F2d 585, 588 (CA 7, 1985) (“No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant’s conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept.”) [*Mezzanatto*, 513 US at 204.]

Any error here did not reach this level. Nonetheless, this Court need not reach this issue here as the question is not presented, since the instructions adequately included the elements of felony-firearm.

C. Traver's arguments based on the ineffective assistance of counsel did not entitle him to relief.

Finally, insofar as Traver did raise an ineffective assistance of counsel claim for each of these alleged instructional errors, the Court of Appeals should have denied relief as there was no error warranting relief. See Issues I and II.

IV. This Court reviews de novo a decision of the Court of Appeals to order an evidentiary hearing on ineffective assistance of counsel and that court should grant it only where the offer of proof requires it.

This question is a narrow one. The court rules for the Court of Appeals provide that a party may file a motion to remand for an evidentiary hearing, supported by an affidavit or offer of proof regarding facts that would be established at this hearing. MCR 7.211(C)(1). Thus, where a criminal defendant has not moved for a new trial based on the ineffective assistance of counsel, the defendant should move for a remand in the Court of Appeals, asking that court to remand for an evidentiary hearing under *People v Ginther*, 390 Mich 443 (1973). See, e.g., *People v Russell*, 297 Mich App 707, 710–711 (2012). As a legal question about whether to grant the motion, the issue is reviewed by this Court de novo.

Significantly, in ruling on these motions, the Court of Appeals should take one of two actions in responding to these motions, where the motion is filed within the time for filing the appellant's brief. MCR 7.211(C)(1)(a). If the affidavit or offer of proof would not warrant relief if assumed to be true, then the Court of Appeals should deny relief on the merits. If, on the other hand, the affidavit or offer of proof could give rise to a basis for relief if taken as true, then the Court of Appeals should remand for a *Ginther* hearing to determine whether the alleged facts are true.

This is an important point because the federal courts currently credit the decision of the Court of Appeals to deny a remand as a merits decision, entitled to deference under 28 USC 2254(d)(1) of the Anti Terrorism and Effective Death Penalty Act. See, e.g., *Nali v Phillips*, 681 F3d 837, 852 (2012) (concluding that because the Court of Appeals denied his motion to remand, “Nali’s ineffective assistance claim was thus adjudicated on the merits in the state courts”).

In the absence of the motion to remand, it is blackletter law that the Court of Appeals is limited to the trial court record. This Court explained this in *Ginther*:

A defendant who wishes to advance claims that depend on matters not of record can properly be required to seek at the trial court level an evidentiary hearing for the purpose of establishing his claims with evidence as a precondition to invoking the processes of the appellate courts except in the rare case where the record manifestly shows that the judge would refuse a hearing. [*Id.*, 390 Mich at 443.]

Thus, where the defendant fails to provide “record evidence” on appeal, this Court has “no basis for considering it.” *People v Blythe*, 417 Mich 430, 438 (1983). In a case in which the defendant had sought such a motion, this Court suggested in an order that the Court of Appeals retains the authority to “grant[] a motion to remand at a later time in the appellate process.” *People v Evanoff*, 340 NW2d 288 (1983). But the proposition that the appellate court is limited to errors apparent from the trial court record where no evidentiary hearing has been held is now so well established that a simple Westlaw search yields scores of cases from the Court of Appeals, many of which are published. See, e.g., *People v Masroor*, 313 Mich App 358, 368 (2015) (“Because defendant did not move for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the existing record.”).

This process makes sense because a criminal defendant should move in a timely way to ensure that a record may be developed close in time to the events that are at issue. That is what is contemplated by MCR 7.211(C)(1)(a)(ii), which identifies issues for remand that require the “development of a factual record.”

V. The majority opinion of the Court of Appeals erred in remanding this matter for an evidentiary hearing on the ineffective assistance of counsel claim as Traver never filed a motion to remand.

The majority decision erred in granting the motion to remand for an evidentiary hearing here.

The majority considered the affidavit, attached as Appendix F, to Traver’s appellant’s brief.² See slip op, p 8. Traver did not file a motion for new trial and did not file a motion to remand, so the attached affidavit was not “record evidence” as it was not part of the “original record.” See MCR 7.210(A)(1). As in *Blythe*, the Court of Appeals had no basis for considering it. 417 Mich at 438. Otherwise, the time parameters established in MCR 7.211(C) for filing governed such a motion are a dead letter. And nothing in the affidavit explains or justifies the delay. Rather, the dissent here aptly disposed of the claim, based on the record before it:

There is no indication in the record as to whether defense counsel informed defendant of the consequences of withdrawing his plea agreement. And, because defendant did not raise the issue of ineffective assistance of counsel below, *our review is limited to the record before us* and defendant has not established a factual predicate for his claim and the presumption that defense counsel acted effectively is not undermined.

² Traver’s brief was filed on July 27, 2015, but the affidavit was filed two months later, on September 19, 2015, and is dated September 16, 2015.

Similarly, *the record fails to show that the alleged error prejudiced defendant. **There is nothing in the lower court record showing that he would not have sought a withdrawal of the plea had he been informed of the possible felony-firearm charge.*** Defense counsel stated at the hearing that defendant was seeking a withdrawal of the plea agreement because he was innocent of the charges and because he was concerned that his status as a marijuana caregiver was being impacted. That a charge of felony-firearm may have been brought does not negate those motivating factors. [Slip op, p 5 (emphasis added; paragraph break added).]

While Traver did ask in his brief on appeal that the Court of Appeals remand for an evidentiary hearing, this is not filing of a motion. Traver's Brief, p 41. The brief was only captioned as an "appeal brief," and Traver did not file a separate accompanying motion. The court rules require the filing of a motion. The rules contemplate that after the motion to remand is filed and granted, "Further proceedings in the Court of Appeals are stayed until completion of the proceedings in the trial court." MCR 7.211(C)(1)(d). The appellant's brief "must then be filed within 21 days after the trial court's decision." *Id.* Traver did not follow this process.

Insofar as the majority opinion was relying on the its general authority to provide relief under the court rules, see MCR 7.216(A)(5), (7), there is relatively little published authority explaining the interplay between MCR 7.211(C) and MCR 7.216(A). The general provision for miscellaneous relief enables the Court of Appeals to act "at any time" and "in its discretion":

Relief Obtainable. The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just:

* * *

(5) remand the case to allow additional evidence to be taken;

* * *

(7) enter any judgment or order or grant further or different relief as the case may require[.] [MCR 7.216(A)(5), (7).]

In a published decision, the Court of Appeals ruled that it would remand for a *Ginther* hearing to determine whether the defendant was denied the effective assistance of counsel without reference to a request to a remand. See *People v Jackson*, 213 Mich App 245, 247 (1995). But while this Court denied leave in *Jackson*, this Court expressly declared that *Jackson* would have no precedential force. 451 Mich 885 (1996).

For the unpublished decisions, the Court of Appeals has provided conflicting opinions. In one vein of cases, the Court indicated that it may remand without an accompanying motion and irrespective of MCL 7.211(C):

[D]efendant did not file a motion to remand, timely or otherwise. A defendant may not expand the record on appeal. Where there has been no motion for a new trial or a *Ginther* hearing in the trial court, a claim of ineffective assistance of counsel is deemed waived except to the extent that it is supported by the record on appeal. However, we recognize that there is nothing in the court rules to suggest that a defendant may or may not simply request a remand in an appellate brief under MCR 7.212(C)(8). *Nevertheless, MCR 7.216(A)(5) and (7) provides authority to remand for an evidentiary hearing without a motion from the defendant. [People v Moore, an unpublished, per curiam opinion, released April 11, 2013 (No. 303750) (Attachment A), Slip op, p 2 n 2 (emphasis added).]*

The contrary unpublished opinion suggests that MCR 7.216(A)(5) and (7) are not a general escape hatch to MCR 7.211(C):

We further note, however, that the fact that defendant did not file a postjudgment motion within the 56-day period permitted under MCR 7.208(B)(1) would not preclude this Court from either granting an appropriate motion to remand under MCR 7.211(C), or from remanding a case for further proceedings as appropriate under MCR 7.216(A)(5) or (7). Nonetheless, *we conclude that such relief is not appropriate because defendant did not file a motion to remand under MCR 7.211(C), and he has not demonstrated that remand for further proceedings is otherwise warranted. [People v Doherty, an unpublished, per curiam opinion, released May 19, 2015 (No. 319391) (Attachment B), Slip op, p 10 (emphasis added).]*

While there may be exceptional circumstances that warrant the application of MCR 7.216 to order a remand for a *Ginther* hearing outside of MCR 7.211(C), the unrestricted use of the rule would blunt the significance of MCR 7.211(C). It is hard to see what ongoing meaning that MCR 7.211(C)(1)(a)'s deadline (that a motion be filed "within the time provided for filing the appellant's brief") would have.

Rather, the proper process for Traver now would be to file a challenge to his conviction under MCR 6.500 *et seq.*, arguing that his procedural bar to raising the claim on direct appeal should be excused on collateral review. The Court of Appeals should have refused to review the affidavit in the absence of a motion to remand under MCR 7.211(C) and would be able to review the question if it wishes in collateral review if raised later. In creating general standards, this process is preferable to one in which the Court of Appeals bifurcates the process, issuing a decision on the merits *and* remanding the matter, which will require yet a *second* decision on the merits. Such a process would undermine MCR 7.211(C) and would mean a slower resolution through the intermediate appellate court, and will require a second panel of judges to review the matter when it returns, because the majority did "not retain jurisdiction." Slip op, p 9.

The delay in the appellate process generally harms all parties. Where a defendant has a short sentence, as here (two years minimum), often his sentence will be complete before the appellate process is finished. The prosecution also has an interest in seeing the process reach its finality in an expeditious way. This Court should reverse the decision to remand for an evidentiary hearing.

CONCLUSION AND RELIEF REQUESTED

This Court should reverse the Court of Appeals and reinstate Traver's convictions.

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